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Brf. of Perry & Holmes
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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1901.

W. C. LYKINS and E. W. W. LYKINS,
Plaintiffs in Error,
vs.
MRS. R. McGRATH,
Defendant in Error.

Gen. No. 17808.
Term No. 90.

Motion to Dismiss and Brief Thereon.

W. C. PERRY,
DANIEL B. HOLMES,
FRANK M. SHERIDAN,
Attorneys for Defendant in Error.

Horn Printing Company,
Kansas City, Mo.

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MOTION TO DISMISS.

Comes now the defendant in error above named, and moves the court to dismiss the pretended writ of error, purporting to have been sued out in this case, for the reasons following, to-wit:

1. Because said so-called writ of error was not made returnable on a certain day therein named, nor made returnable on any day.

2. Because said so-called writ of error was not made returnable to any given or stated term of this court.

3. Because the court has no jurisdiction to hear or consider the matters involved in the record, because the case did not arise "under the con-

stitution, laws or treaties of the United States;" and because the case is not one which this court can take cognizance of.

STATEMENT OF FACTS AND OBJECT OF MOTION.

The first two grounds of the motion are based on the fact that the writ of error (Record pp. 1, 2) fails to name any date whatever on which it is returnable.

The third ground of the motion is based on the idea that the federal courts have no jurisdiction of the action; and the further idea that if the circuit court had jurisdiction this is not one of the cases described in Section 5 of the Act of March 3, 1891.

The plaintiffs below—plaintiffs in error here—sought to recover possession of certain real estate, and damages for withholding possession thereof. They alleged (Record pp. 7, 8) that they are members of the Peoria tribe of Indians, and reside in the Indian Territory, and that said land was allotted to their father, David Lykins, a member of the Peoria tribe of Indians, under the treaty of May 30th, 1854 (10 Stat. 1082) and the act of March 3rd, 1859 (11 Stat. 430); that a patent, which conveyed the land to him, was issued on November 5th, 1859; that they are his heirs at law; that he conveyed the land on June 3rd, 1864; that he died on August 14th, 1864; and that the Secretary of the Interior did not give his consent to such deed until March 10th, 1865.

The sole contention of the plaintiffs is that the deed of their ancestor is void because the secretary did not consent to it till after the death of the grantor therein.

Wherefore, the defendant in error prays that the case be dismissed for want of jurisdiction.

W. C. PERRY,
DANIEL B. HOLMES,
FRANK M. SHERIDAN,
Attorneys for Defendant in Error.

NOTICE OF HEARING OF MOTION.

The plaintiffs in error, and their attorneys, will take notice that the foregoing motion will be submitted to the court on Monday, the 18th day of November, 1901, unless the case is reached for argument prior to that date; in which event said motion will be submitted on the date of the argument.

W. C. PERRY,
DANIEL B. HOLMES,
FRANK M. SHERIDAN,
Attorneys for Defendant in Error.

ACKNOWLEDGEMENT OF SERVICE OF MOTION.

Service of the foregoing motion and notice is hereby acknowledged this ——— day of October, 1901.

Attorney of Record for Plaintiffs in Error.

The material part of the writ of error (Rec. pp. 1-2) reads as follows:

" * * * do command you, if judgment be therein given, that *you* then, under your seal, distinctly and openly send the record and the proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that *we* have the said record and proceedings aforesaid at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before the —— day of ——, 1900, to the end that, the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done."

The judgment of the Circuit Court, from which the pretended writ of error was sued out, was rendered on November 22nd, 1899 (Rec. page 10). The so-called writ itself is dated on the 12th day of May, 1900; and, as shown in the above quotation, it was not made returnable to any given or stated term of this court, nor was it made returnable on any day or date whatever.

On April 16, 1900, the petition for a writ of error was granted. The order, then made, allowed the writ, without specifying when it should be returned (Rec. p. 13). The citation was issued and served on May 11, 1900. The citation itself is in violation of paragraph 5 of rule 14, in that it is made returnable 60 days from its date instead of 30 days.

In the parallel case of *Carroll v. Dorsey*, 20 How. 205, the court, after stating the facts, said:

"It is evident, from this statement, that the case is not before the court. The Act of 1789, section 22, requires that the writ of error should be made returnable on a certain day, therein named; and, indeed, upon common-law principles, a certain return day in a writ of error is essential to its validity. There is, therefore, no process by which the case is legally brought before this court, and consequently we have no jurisdiction over it. * * * ."

"But it is said, on behalf of the plaintiffs in error, that these are mere irregularities, which were waived by the general appearance at the last term, and that the motion at the present term is too late.

"Undoubtedly the appearance of the defendants at the last term, without making a motion to dismiss, cures the defect in the citation. The citation is nothing more than notice to the party to appear at the time specified for the return of the writ of error. And if he appears, it shows that he had notice; and if he makes no objection during the first term to the want of notice, or to any defect in the citation, he must be regarded as having waived it. The citation is required for his benefit, and he may therefore waive it if he thinks proper, and proceed to trial in the appellate court. This point was decided in the case of the *United States v. Yulee et al.*, 6 How. 603; but the court at the same time said that the appearance did not preclude the party from afterwards moving to dismiss for the want of jurisdiction, or upon any other sufficient ground.

"The same point was again decided in the case of *Buckingham et al. v. McLean et al.*, 13 How. 150, in which the court said that a motion to dismiss for want of a citation must be made at the first term at which the party appears, and it is too late if made at a subsequent term. But the want of a writ of error, such as is prescribed by the act of congress, stands on different ground. And in the case of the *United States v. Curry*, 6 How. 118, the court held that where the power of the court to hear and determine a case is conferred by acts of congress, and the same authority which gives the jurisdiction points out the manner in which it shall be brought before us, we have no power to dispense with the provisions of the law, nor to change or modify them.

"Upon this ground the case in not legally before us, and must be dismissed for want of jurisdiction."

This case has been frequently followed in subsequent decisions, and is still binding authority as to a record in the condition in which this is.

THE COURT HAS NO JURISDICTION.

The petition (Rec. p. 7) alleges that the plaintiffs are residents of the Indian Territory, and that the defendant is a citizen of the United States and a resident of Kansas. Hence the court below did not obtain jurisdiction by reason of the diverse citizenship of the parties—if it did this court has no jurisdiction.

The supposed basis of jurisdiction is that the case arises "under the * * * laws of the

United States, and treaties made, or which shall be made under its authority" (Const. Art. 3, Sec. 2), and that part of the act approved August 13, 1888, (25 Stat. 433), which provides that the circuit courts of the United States shall have jurisdiction of the cases described in the clause of the Constitution above cited.

Neither the treaty nor the Act of Congress above referred to will be construed by any decision that can be made in this case. Neither of those instruments created or conferred the right or title on which the plaintiffs rely. They claim by inheritance from the allottee. The treaty was executed when the allotment was made. The Act of Congress was fulfilled when the Secretary consented to the deed of the allottee. The only matter the court can decide is whether such consent, made after the death of the grant or in the deed, was effectual. Such a decision will not call in question the power conferred on the Secretary, nor require an interpretation of the act. The treaty and the act will be merely incidental to a decision of the matter in controversy.

It has frequently been decided that it is not sufficient that in the course of the litigation it may become necessary to construe the Federal Constitution or laws or treaties, but that the decision of the case must depend upon that construction. But it is not necessary here to go that far. The right of the allottee to the land set apart and conveyed to him under the treaty is not questioned. Indeed, both parties claim under the allottee.

The Act of Congress provided that the land should "never be sold or conveyed by the grantee or his heirs, without the consent of the Secretary of the Interior for the time being." It is conceded that the conveyance in question required the consent of the Secretary, and that it received such consent. The plaintiffs contend that because such consent was given after the death of the grantor it was ineffectual, and that therefore the deed itself was of no force. The defendant insists that the deed in controversy was properly executed and delivered by the grantor, and that the date of the consent of the Secretary is immaterial. The correct solution of this question will not require a construction of the treaty or the act. Neither of those instruments conferred the alleged title of the plaintiffs. Their complaint shows that they claim by descent from the allottee, and that such claim is based on an allegation that his deed was invalid, not because the Act of Congress was violated by the Secretary, but because the allottee happened to die—not before he sold the land—but before the Secretary performed his duty by consenting to the deed of conveyance. It is the deed—not the treaty, nor the statute—that must be construed. The controversy, therefore, does not involve a Federal question.

Gold Washing etc. Co. v. Keys, 96 U. S. 199.
Insurance Co. v. Wisconsin, 119 U. S. 473.
McCain v. City of Des Moines, 174 U. S. 168.

This is made apparent by section 5 of the act of March 3, 1891, (26 Stat. 827) as amended (29

Stat. 492) and the decisions construing that section.

The only clause of that section under which it can be claimed a writ of error in this case could be founded, reads as follows:

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question."

This act has been frequently before the court, and it would be an exhibition of useless pedantry to quote the decisions at large. In *Bank v. Peters*, 144 U. S. 570, and in many subsequent cases, it is said that there are six classes of cases in which a direct appeal or writ of error can be prosecuted to this court. If this case falls within either of those classes, it must be the fifth, and because it is necessary to construe the treaty under which the land was allotted to David Lykins. Manifestly, no such claim can be sustained; for, even if the controversy involves a construction of anything except the deed executed by David Lykins, and the consent of the secretary thereto, it is the act of congress, in which the restriction on alienation appears, that will be interpreted and not the treaty.

Obviously, the suggestion in the brief for the plaintiffs (p. 11) that the fifth amendment to the constitution will be violated if the deed in question is held to be effectual, will not bring the controversy within the fourth class of cases mentioned in the act. That suggestion is not put forth in

the petition of the plaintiffs; it is not made by the *record; it is introduced by counsel in their brief* merely by way of argument.

It is not perceived that the ruling on the jurisdictional question in *Pickering v. Lomax* militates against this contention. That case came here from the Supreme Court of Illinois, and it was held that this court had jurisdiction within the terms of Sec. 709, R. S., which provides, among other things, that a final judgment rendered in the highest court of a state may be reviewed where there,

"Is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity, * * * or where any title * * * is claimed under the Constitution, or any treaty or statute of * * * the United States, and the decision is against the title * * * specially claimed * * * under such * * * statute."

And it was held that the proviso in the treaty, there considered, which prohibited alienation without the permission of the president, remained in operation so long as the land was owned by the patentees or their heirs, and that the case raised the question of the validity of an authority exercised under the United States. But, as above shown, the present question of jurisdiction does not arise under Sec. 709, and *Pickering v. Lomax* is not, therefore, authority against this position of the defendant in error.

It may be urged that jurisdiction was conferred on the circuit court by the Act of August 15, 1894 (28 Stat. 286-2 Supp. R. S. 246).

The pertinent portion of that act reads as follows:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto, in the proper circuit court of the United States.

"And said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within there respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty."

To confer jurisdiction under this statute, it must appear that the plaintiffs are entitled, or claim to be entitled, to an allotment of land under some law passed, or grant made, by congress, or that they have been unlawfully excluded from an allotment or other parcel of land which they are lawfully entitled to under some act of Congress. But this is not all: they must also show that they are in whole or in part of Indian blood or descent. The allegations in the petition are that their an-

cestor was "a member of said Peoria tribe of Indians", and that "they are members of the Peoria tribe of Indians." There is no allegation that David Lykins had any Indian blood in his veins, or that the plaintiffs have any in theirs; nor is there any averment which shows that the plaintiffs are entitled to or that they claim the land in controversy as an allotment, or that they are entitled to it by virtue of any act of Congress. Their claim to the land rests on the statute of descents of Kansas.

There is nothing in this case, so far as the plaintiffs are concerned, that appeals to the equitable instinct of the court. From the absence of any averment that the plaintiffs are of Indian blood or descent, or that their father was of Indian blood, and from the averments showing who the defendant is, and the claim for rents and profits, it may be fairly inferred that this is a contest between white men who hold membership in the Indian tribe by adoption, or by descent from an adopted member of the tribe, and an aged white woman, who bought and paid for the land more than a generation ago.

The motion should be granted, and the case dismissed.

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